FILE COPY

FEB 28 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-818

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA,

Petitioner,

—v.—

SYLVESTER WEAVER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

JEROME J. BORNSTEIN
125 South Court Avenue
Orlando, Florida 32801

Attorneys for Respondents

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-818

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA,

Petitioner,

—v.—

SYLVESTER WEAVER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Question Presented

Whether the court of appeals erred in refusing to permit a school board to rely solely upon a majority-to-minority transfer plan to desegregate a virtually all-black elementary school where more effective techniques for desegregating that school were available to the board.

Argument

On October 13, 1961, black parents and students (hereinafter, "respondents") filed this lawsuit seeking an end to the dual, racially-segregated school system in Brevard County, Florida administered by the petitioner, the School

Board of Brevard County.[1] At that time, Poinsett Elementary was one of seven facilities in Brevard County attended exclusively by black students. Poinsett remained all-black until the 1969-70 academic year when petitioner was required by court order to implement a geographic zoning plan to desegregate that facility. As a consequence, 23 white students joined 737 black students at Poinsett, reducing its enrollment from 100% to 96.9% black. In 1971, petitioner was required to take further steps to desegregate Poinsett. A majority-to-minority transfer plan was approved by the district court for 1971-72 implementation. Yet, as of March, 1972, Poinsett remained 97% black, only 100 of the approximately 800 blacks enrolled there having exercised the right to transfer with space available and free transportation. The court of appeals agreed with respondents that the majority-to-minority transfer plan did not represent an effective technique for desegregating Poinsett.

Petitioner contends here that it has no affirmative constitutional duty to desegregate Poinsett further. This is so, petitioner argues, first, because it is not required to achieve racial balance in order to convert its dual system to a unitary one. Second, the existence of one virtually all-black school in its otherwise desegregated system does not, *per se*, render that system unconstitutional. And third, the majority-to-minority transfer approach constitutes an acceptable technique for achieving greater desegregation. Respondents do not quarrel with any of these assertions, considered in the abstract. But there are constitutional principles of equal importance relating to desegregation which must be considered in conjunction with those relied upon by petitioner. Racial balance is not the constitutional

---

[1] Formerly called "the Board of Public Instruction of Brevard County."

objective; but school boards are under an affirmative duty to achieve the "greatest possible degree of actual desegregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The continued existence of all-black or virtually all-black schools can be condoned only where it has been established that no feasible alternatives are available to destroy the one-race character of such schools. *Swann, supra.* School boards may not rely upon majority-minority transfer plans to desegregate one-race schools where other more effective techniques exist. And school boards have a heavy burden to bear in justifying reliance upon manifestly less effective alternatives in dismantling dual systems. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

The court of appeals correctly applied this second set of principles in rejecting petitioner's majority-to-minority transfer plan for desegregating Poinsett. For it found that Poinsett was surrounded by at least six virtually all-white elementary schools which could be paired or clustered with Poinsett to desegregate that facility. The distances between Poinsett and these schools are as follows:

Golfview	—	1.2 miles
Cambridge	—	2.2 "
Mila	—	3.0 "
Anderson	—	3.5 "
Tropical	—	4.2 "
Audubon	—	5.6 "

The feasibility of pairing or clustering Poinsett with these schools was established by several facts. Petitioner had previously submitted a desegregation plan for Poinsett that would have converted it to a special education center to which children from not only the nearby six schools mentioned above, but from all the schools in the county,

would have been sent on a weekly rotation basis. And, the majority-to-minority transfer plan implemented by petitioner for the 1971-72 academic year envisioned that Poinsett students would be eligible to attend any of the six schools nearest that facility.

Hence that court concluded that petitioner had not achieved the greatest possible degree of actual desegregation, that Poinsett remained all-black despite the availability of more effective desegregation techniques, and that nothing in the record served to justify petitioner's preference for a patently less effective desegregation approach. Petitioner has presented nothing to this Court that discredits in any respect these findings of the court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
DREW S. DAYS, III
10 Columbus Circle
New York, New York 10019

JEROME J. BORNSTEIN
125 South Court Avenue
Orlando, Florida 32801

Attorneys for Respondents